Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1486

UNITED STATES OF AMERICA,
Petitioner,

v.

CALMAN BERNSTEIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM OF CALMAN BERNSTEIN, RESPONDENT, IN REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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1. The Government urges that, as a result of the recent *en banc* decision of the Fifth Circuit, in *United States v. Doolittle,* . . . F.2d . . ., there is now a genuine conflict among the Circuits. We suggest, however, that the conflict is not of sufficient importance to justify the granting of certiorari for review of the present case. We note that, with the exception of *Doolittle,* every other

court which has considered this issue has reached the same result as the Court of Appeals here. See: *United States v. Donovan,* 513 F.2d 337 (6th Cir., 1975); *United States v. Moore,* 513 F.2d 485 (D.C. Cir., 1975); and *Carter v. State,* 337 A.2d 415, 425 (Md., 1975). It is highly doubtful that *Doolittle* will stand as persuasive authority for any other court. In *Doolittle,* as the Government itself acknowledges, neither the opinion of the panel nor that of the court *en banc* discussed the "serious practical" questions inherent in a full consideration of the problem (Pet. Supp. Memo., p. 2). It should be noted that six judges of the Court of Appeals for the Fifth Circuit dissented in *Doolittle.* The dissenting opinions of Judges Thornberry and Godbold exposed the serious flaws in the opinion of the slim majority of their Court.

2. Taking note of its subsequent petition in *United States v. Donovan,* No. 75-212, also pending before this Court, the Government asserts that *Donovan* raises the same issues presented here. The Government asks this Court to consider *Donovan* plenarily, or, alternately, to grant *Donovan* and to hold the petition in this case for disposition after the decision in *Donovan.* We suggest, to the contrary, that, if certiorari is to be granted, the present case, rather than *Donovan,* is more appropriate for full consideration. Our reasons include the following:

A. In the present case, as in *Donovan,* the threshold question is whether the respondent was "known" to the applicant for the eavesdropping. The statute, 18 U.S.C. 2518(1)(b)(iv), requires only that "known" persons be named in the application and order. Here, the detailed findings of the District Judge established that the respondent was a target of the investigation and that he was known to be both a

participant in the criminal activity and a user of the intercepted telephone line (Pet. App. E, pp. 37a-45a; Jt. App. 461-64). In *Donovan,* on the other hand, it is not at all clear that the respondents were "known" within the meaning of the statute. Testimony presented there indicated that, as to some of the respondents at least, the Government claimed only to have "suspicions" and that there was "an apparent lack of communication" among those engaged in the investigation. See, *United States v. Donovan,* 513 F.2d 337, 341-43 (6th Cir., 1975).

B. The present case involves a significantly different and more aggravated failure to adhere to the statute than presented in *Donovan.* The circumstances of this case were so compelling as to lead the District Judge to conclude that failure to name the respondent in the eavesdropping application and order had been "tantamount to demonstrating a conscious disregard for the dictates of Title III" (Pet. App. E, pp. 36a, 45a; Jt. App. 460-61). In *Donovan,* on the other hand, it appears from the opinion of the Court of Appeals that the failure to name the respondents might only have been "inadvertent" (513 F.2d 337, 341).

C. Because this case, unlike *Donovan,* involves deliberate denigration of the statutory requirement, the suppression sanction might be appropriate here but inappropriate in *Donovan.* Cf., *United States v. Eastman,* 465 F.2d 1057 (3rd Cir., 1972). If this Court were to consider the nature of the statutory violation as an element in the determination whether the suppression sanction should be employed, the present case would be a more appropriate vehicle for such a purpose.

D. *Donovan,* unlike this case, presents multiple issues. The order of the Court of Appeals in *Donovan* could be affirmed on the basis of the other issue, failing to give inventory notice as required by 18 U.S.C.

2518(8)(d), without any resolution of the question relating to the failure to name known subjects as required by §2518(1)(b)(iv).

Respectfully submitted,

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